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93-219

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

No.

DONALD RICHMOND,

Petitioner,

v.

IRVIN NODLAND,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF NORTH DAKOTA

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30pp

QUESTION PRESENTED

1. Did the Supreme Court of North Dakota act in an arbitrary and capricious matter when it affirmed an Order of the Trial Court; an order which was clearly improper and in conflict with Rules of Law and in conflict with its own decision in a similar case and in conflict with decisions of other state courts and other United States Court of Appeals.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH DAKOTA

The petitioner Donald Richmond respectfully prays that a writ of certiorari issue to review the mandate of the Supreme Court of North Dakota filed in this proceeding on June 16, 1993.

OPINION BELOW

The mandate of the Supreme Court of North Dakota, not yet reported, appears in the Appendix hereto.

JURISDICTION

A timely petition for rehearing was denied on July 1, 1993, and this petition for certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 2101 (c).

STATEMENT OF THE CASE

On February 11, 1988, petitioner, Donald Richmond - a 75 year old resident of North Dakota, retired - agreed to employ respondent, Bismarck attorney Irvin Nodland, to defend him in Court. An oral agreement was reached on April 6, 1988. Nodland agreed to represent Richmond in Court, and through an anticipated jury trial, if Richmond would advance $10,000, which would be used for two (2) expert witnesses, to take depositions, and to pay

for such other investigation work as would be required to prove that the accusation of arson was false, without probable cause and should never have been issued; and that if Richmond did not fund this expensive defense effort, he would be found guilty and face up to 20 years in prison. An attorney's duty to client exists in relation to representation sought and scope of authority conferred.

Nodland agreed with Richmond's contention that the complaint was patently false, made without any investigation and unsupported by any evidence that would lead a reasonable, prudent person to believe that the fire was incendiary in origin. Nodland stated that these failures had been brought to the attention of the prosecutor but that the prosecutor was, nevertheless, adamantly planning to proceed with the prosecution, and because of this Richmond would need to advance the

$10,000 to fund the defense effort. Nodland did not reduce this agreement to writing.

On May 9, 1988, the day before the scheduled preliminary hearing, Nodland phoned the prosecutor and advised him that (a) there was no evidence to support a complaint that the fire was incendiary in origin and (b) the device used to trigger the arson statute, a proof of loss, had not been submitted by Richmond, as stated in the complaint, but had, in fact, been submitted by the insured, Mr. Schauer. The prosecutor then did read the complaint file. Finding that what Nodland had told him was true, he immediately arranged to have the complaint dismissed before it could be heard in court.

Contrary to the oral agreement that Nodland would take this case to court so as to prove Richmond's innocence and restore his name and reputation, Nodland

solicited a dismissal that he knew the prosecutor would be forced to accept because, by law, the prosecutor cannot continue a case when there is no probable cause to continue. This was done without Richmond's knowledge, consent or intention.

In his deposition, the prosecutor, Assistant State's Attorney Bruce Haskell, states that it was not until May 9, 1988, that he was advised of the falseness of the complaint; that if he had been advised earlier, he would have dismissed earlier, thus eliminating the need for a proposed expensive defense effort.

Richmond asked Nodland to return the $10,000 advance because none of the money had been spent as outlined, Nodland had not taken the case to court, and Nodland had done nothing to restore Richmond's name or reputation. Nodland told Richmond "sue me"!

Richmond sued Nodland for breach of contract, and for legal malpractice in using fraud and deceit to induce Richmond to enter the contract.

Nodland made a motion for summary judgment, claiming that the $10,000 was a non-refundable retainer agreement, and that he was not actually required to do anything. And, in fact, the only thing Nodland did, between April 6, 1988 and May 9, 1988, was to phone the prosecutor and solicit dismissal; and this was not a part of the oral agreement reached on May 9, 1988, between Richmond and Nodland.

The Trial Court granted the motion for summary judgment. Richmond appealed the Order to the Supreme Court of North Dakota; and that Court affirmed the Order and refused a Petition To Rehear. The affirmation of the Order and the denial of the request for a rehearing are shown in the appendix.

REASONS FOR GRANTING THE WRIT

Rule 56, North Dakota Rules of Civil Procedure - which is the same as Rule 56, Federal Rules of Civil Procedure - clearly outlines that where there is a genuine issue of material fact, summary judgment is improper. The Supreme Court of North Dakota, in its Opinion of June 16, 1993, admits that there is a dispute between Richmond and Nodland as to the terms of the agreement; and this coincides with the Trial Court and with Nodland's counsel, both agreeing that a dispute exists. This dispute is a genuine issue of material fact.

In McAdam v. Dynes, 442 N.W. 2d 914, 196 (N.D. 1989) - a case closely mirroring the instant case because it concerns an oral agreement not reduced to writing by the attorney - the Supreme Court of North Dakota held that summary judgment was improper, reversed the Order and remanded

the case for trial. There is absolutely no reason for the Supreme Court of North Dakota not to apply the same ratiocination to this case.

In Bernstein v. Kritzer, 224 App Div. 387; and DiDonna v. Sachs, 9 App Div. 576, it is held:

> "Where affidavits of plaintiff and defendant are diametrically opposed and it is apparent that one of the parties is not telling the truth, the credibility of the parties is a question for the jury and the motion should be denied."

In Hatch v. Bush, 13 ALR 3d 503:

> "It is held that the affidavit of the party opposing a motion for summary judgment must be accepted as true."

These instances of case law as well as 17 other instances of decisions by other state courts and United States Courts of Appeal, and Rule 56, were brought to the attention of the Supreme Court of North Dakota. They are all pertinent to the instance case, and in each instance an Order granting summary

judgment was reversed and the case was remanded for trial.

The Supreme Court of North Dakota acted in an arbitrary and capricious manner - as outlined in Rule 10.1 (a & c), Rules of the Supreme Court of the United States - when it affirmed rather than reversed the Order of the Trial Court that granted summary judgement in this case.

CONCLUSION

For the reasons set forth above, the petition should be granted.

Dated: Bismarck, N.D.
August 4, 1993

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APPENDIX

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

No.

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PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF NORTH DAKOTA

Filed by Clerk Supreme Court
June 16, 1993

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Donald Richmond, Plaintiff and Appellant

v.

Irvin Nodland, Defendant and Appellee

Civil No. 920372

Appeal from the District Court for Burleigh County, South Central Judicial District, the Honorable Maurice R. Hunke, Judge.

AFFIRMED.

Opinion of the Court by Levine, Justice

Donald Richmond, P.O. Box 193, Bismarck, ND 58502. Pro se.

James S. Hill (argued), of Zuger Kirmis & Smith, P.O. Box 1695, Bismarck, ND 58502-1695, for defendant and appellee.

Richmond v. Nodland

Civil No. 920372

LEVINE, Justice.

Donald Richmond appeals from a district court summary judgment dismissing his action against Irvin Nodland for fraud and deceit, legal malpractice and breach of contract. We affirm.

In February 1988, Richmond was

charged with arson in connection with a December 1987 mobile home fire. In May 1988, before the preliminary hearing, Assistant Burleigh County States Attorney Bruce Haskell filed, and the trial court granted, a motion to dismiss the arson charge against Richmond. The factual circumstances underlying these events are detailed in Richmond v. Haney, 480 N.W.2d 751 (N.D. 1992), and need not be repeated here.

When Richmond learned he had been charged with arson, he contacted attorney Calvin Rolfson. Rolfson met with Haskell, reviewed the criminal complaint and supporting investigative reports in the file, and determined "that there was sufficient probable cause to charge [Richmond] with arson . . . ." Rolfson recommended that Richmond be represented by a more experienced criminal defense attorney and arranged an April 6, 1988,

meeting between Nodland and Richmond to discuss possible representation. Richmond claims that Rolfson also told him that Nodland would require a $10,000 retainer fee, but that any amount not used for Richmond's defense would be refunded. Although the parties dispute the terms of the retainer agreement reached at the April 6 meeting, it is undisputed that Nodland agreed to represent Richmond on the arson charge and that Richmond gave Nodland a $10,000 check.

Nodland entered an appearance on Richmond's behalf. He contacted Haskell and advised him of potential defects in the case, including Richmond's failure to sign the proof of loss form that has been submitted to the insurance carrier for the mobile home. In May 1988, on the date scheduled for Richmond's preliminary hearing, Haskell filed a motion to dismiss the criminal complaint. Haskell explained

in an affidavit:

> "The motion to dismiss was based upon my conversation with a representative of Allstate Insurance Company. I was informed that a proof of loss form had been submitted to the company, but that the form was apparently unsigned and that no other action had been taken to pursue the claim. It was my belief at that time that the failure to pursue the insurance claim would make it difficult to prove that Donald Richmond set the fire for the purpose of collecting insurance proceeds, therefore dismissal was appropriate."

The trial court granted the motion.

In April 1990, Richmond, appearing pro se, brought this action against Nodland for damages arising from Nodland's legal representation of him in regard to the 1988 arson charge. Richmond sought to recover for breach of contract the $10,000 he paid Nodland to represent him as well as damages for fraud and deceit and legal malpractice. Richmond alleges that Nodland fraudulently induced him into paying $10,000 for a trial defense requiring numerous expert witnesses that

Nodland "knew would not be needed and which would not take place." Richmond further alleges that Nodland advised him that Haskell had been notified that there was no probable cause for issuance of the complaint, but that Haskell nevertheless refused to dismiss the charge. Richmond also alleges that Nodland deceived him by this advice in order to obtain the $10,000 advance for a defence in court when Nodland knew the complaint would ultimately be dismissed without the necessity of a trial. He asserts that he did not want the arson charge dismissed and that the terms of the fee arrangement with Nodland were that "if Haskell did change his mind and dismiss before the case got into court, the $10,000.00 would be returned" to him.

The trial court granted Nodland's motion for summary judgment, dismissing all of Richmond's claims. Richmond

appeals, asserting that summary judgment was improperly granted in this case.

Summary judgment is appropriate when, after viewing the evidence in the light most favorable to the party opposing the motion, there are no genuine issues of material fact or conflicting inferences which can reasonably be drawn from undisputed facts, or when the only issues to be resolved are questions of law. United Accounts, Inc. v. Teladvantage, Inc., ___ N.W.2d ___, ___ (N.D. 1993). Under NDRCivP 56, the movant has the burden of establishing entitlement to summary judgment. First State Bank of Casselton v. McConnell, 410 N.W.2d 139, 140-141 (N.D. 1987).

We agree with Nodland that the trial court properly granted summary judgment dismissing Richmond's claim for fraud and deceit. That claim is premised on Richmond's assertions that there was no

probable cause to support the arson charge, that Nodland knew this at all times, and that Nodland fraudulently obtained the $10,000 fee because he knew no trial would take place. In Richmond v. Haney, supra, 480 N.W.2d at 758, we affirmed a summary judgment dismissing Richmond's malicious prosecution action based on the filing of the arson complaint, holding that "a person need not actually sign a proof of loss claim to be guilty of arson" and that "probable cause existed to instigate the prosecution against" Richmond. There is no dispute as to material facts on this issue. We conclude that the trial court properly granted summary judgment dismissing Richmond's claim based on fraud and deceit.

We also agree with Nodland that summary judgment of dismissal was proper with regard to Richmond's claim of legal

malpractice. Richmond appears to argue that Nodland committed legal malpractice by failing to obtain a dismissal of the arson charge prior to accepting the $10,000 retainer and by advising him that a dismissal of the charge would be difficult to obtain.

The elements of a legal malpractice action against an attorney for professional negligence are the existence of an attorney-client relationship, a duty by the attorney to the client, a breach of that duty by the attorney, and damages to the client proximately caused by the breach of that duty. Klem v. Greenwood, 450 N.W.2d 738, 743 (N.D.1990). The standard of care or duty to which an attorney is held in the performance of professional services is that degree of skill, care, diligence and knowledge commonly possessed and exercised by a reasonable, careful, and prudent attorney

in the state. Sheets v. Letnes, Marshall & Fiedler, Ltd., 311 N.W.2d 175, 180 (N.D. 1981). Generally, expert testimony is necessary to establish the professional's standard of care (duty) and whether the professional's conduct in a particular case deviated from that standard of care (breach of duty). Wastvedt v. Vaaler, 430 N.W.2d 561, 565 (N.D. 1988). If the professional's misconduct is so egregious and obvious that a layperson can comprehend the professional's breach of duty, expert testimony is not required. Id. Because of the complexities of the practice of law, it is a rare case when expert testimony is not required to establish the professional's standard of care and the breach of that duty. See 2 Mellen & Smith, Legal Malpractice §§ 27.14 and 27.15 (3d ed. 1989).

Nodland's asserted acts of professional misconduct cannot be

classified as so egregious and obvious that a layperson could comprehend a breach of duty without the assistance of expert testimony. In support of his motion for summary judgement, Nodland submitted an affidavit of an expert who reviewed the documents and depositions filed in this case and concluded that "Nodland had no obligation to Richmond prior to April 6, 1988," and that "Nodland met or exceeded any standard of practice which would apply under these circumstances in his representation of Donald Richmond during the time frame of April 6, 1988 through the date of dismissal." Even though this action was commenced more than three years ago, Richmond has not produced any expert witness testimony to controvert this expert's opinions, nor has he indicated that he needs additional time to obtain a supporting expert opinion. Under these circumstances, we conclude that there is

no genuine issue as to material facts on Richmond's legal malpractice claim and that the trial court properly granted summary judgment dismissing it. See Klem v. Greenwood, supra, 450 N.W.2d at 744 n.5; see also Boigegrain v. Gilbert, 784 P.2d 849, 850 (Colo.Ct.App. 1989); Schmidt v. Hinshaw, Culbertson, Etc., 75 Ill.App.3d 516, 394 N.E.2d 559, 564-565 (1979); Bloom v. Dieckmann, 11 Ohio App.3d 202, 464 N.E.2d 187, 188 (1983); Annot., Admissibility and Necessity of Expert Evidence as to Standards of Practice and Negligence in Malpractice Action Against Attorney, 14 A.L.R.4th 170 (1982).

We also agree that the trial court properly granted summary judgment dismissing Richmond's breach of contract claim against Nodland. Nodland asserts that Richmond's payment of $10,000 was for a non-refundable retainer agreement which covered Nodland's legal services

commencing on April 6, 1988, through a jury trial, if one was necessary. Richmond asserts that the entire $10,000 would not become owing unless there was a trial or other in-court proceeding on the arson charge. However, in a letter to Rolfson dated May 11, 1988, in the midst of the legal maneuvering over the criminal charge and almost two years before this action was commenced, Richmond disclosed his knowledge of the terms of his agreement with Nodland to pay a non-refundable $10,000 for Nodland's services. While Richmond complained to Rolfson that the deal Nodland insisted upon was not the deal that Rolfson had forecast would occur, it is clear from the letter that Richmond understood very well what he had to pay to acquire Nodland's services. In the letter to Rolfson, Richmond stated:

> "I made out a check to Irv Nodland in the amount of $10,000. He said that this would cover thru a jury trial. If we lost, I would be required to

> pay more for the appeal. I asked if a major part of this $10,000 would be refunded if, as I expected, it was dismissed at the hearing. Irv said there was no refund. You heard me tell Irv that this wasn't my understanding; that you had told me money was drawn off the advance as needed for fees and expenses, and that if there was anything left, it was refunded. You then interjected to say that what you had said outlined how your firm handled advances, and that you thought Irv worked the same way!"

The fee agreement reached by the parties at the April 6 meeting was not reduced to writing. Ordinarily, when a fee contract for legal services is oral rather than written and must be proved by the testimony of the parties, summary judgment is inappropriate to resolve disputed issues of material fact as to the terms of the fee contract. See McAdam v. Dynes, 442 N.W.2d 914, 916 (N.D. 1989). In this case, however, even viewing the evidence in the light most favorable to Richmond, we conclude that there are no genuine issues of material fact about the

terms of the parties' oral fee agreement. The trial court did not err in granting summary judgment dismissing Richmond's breach of contract claim against Nodland.

Accordingly, the summary judgment is affirmed.

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SUPREME COURT OF NORTH DAKOTA
Office of the Clerk
Judicial Wing, First Floor
600 East Boulevard Avenue
Bismarck, ND 58505-0530
(701) 224-2221

Clerk of the Supreme Court
Penny Miller

July 1, 1993

Mr. Donald Richmond
P.O. Box 193
Bismarck, ND 58502-0193

RE: Richmond v. Nodland
Supreme Court No. 920372

The Supreme Court entered an order today denying the petition for rehearing in this case.

Pursuant to Rule 41(a), NDRAppP, the mandate of the Supreme Court will be forwarded to the Clerk of District Court after the expiration of seven days.

Sincerely yours,

Penny Miller
Clerk
North Dakota Supreme Court

PM:tb

pc: Mr. James S. Hill
The Honorable Maurice R. Hunke